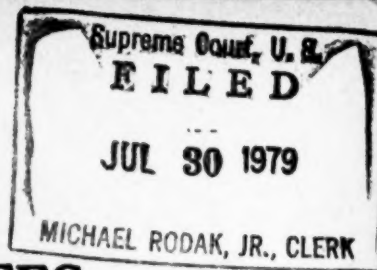


**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

October Term - 1978

No. 78-1929



**EUGENE BRODY,**

**Petitioner,**

**vs.**

**FRANCIS MONTALBANO,  
FRANCES MONTALBANO,  
VIRGINIA WESTPHAL,  
DORIS SCOBAY and  
FRED J. SCOBAY,**

**Respondents.**

---

**ON PETITION FOR A WRIT OF CERTIORARI  
TO THE  
SUPREME COURT OF THE STATE OF CALIFORNIA**

**GARY L. ZIMMERMAN  
FRIEMAN, ROSENFELD & ZIMMERMAN  
A Professional Corporation  
9100 Wilshire Boulevard  
Suite 201  
Beverly Hills, California 90212  
(213) 278-7560**

**Attorneys for Respondents**

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Attorneys for Respondents

--i--

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

Material Facts

For purposes of their brief, Respondents adopt the statement of facts contained in the Opinion of the Court of Appeal of the State of California set forth in the Appendix to the Petition on file herein.<sup>1</sup>

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC 1257(3).

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor...

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court or has decided it in a way probably not in



accord with applicable  
decisions of this court." 2

Petitioner seeks to have this Court exercise its discretion based upon the raising of the federal questions by Respondents in their Answer. While it is true Respondents did urge in their Answer the affirmative defense of a violation of their constitutional rights under both the Federal and State of California Constitutions, neither the Court of Appeal nor the California Supreme Court decided the Federal or State Constitution questions. Rather, the decision was based upon independent state grounds of the decisional law of the State of California.

A review of Petitioner's position in the state court is appropriate. At no time in the trial court proceedings did Petitioner raise or argue a denial of his constitutional rights. The transcript of the trial court proceedings fails to disclose any such position being advanced by Petitioner, even after the trial court announced its intention to

direct a verdict in favor of Respondents. On appeal to the Court of Appeal, Petitioner's opening brief did not raise nor speak to the federal question of a denial of Petitioner's constitutional rights. Even after Respondents filed their brief, Petitioner once again, in his reply brief, ignored the issue he now seeks to raise herein to invoke this Court's jurisdiction. Only after the Court of Appeal issued its opinion below did Petitioner for the first time in these proceedings seek to raise the federal issue. 3

Thereafter, Petitioner filed a petition for hearing in the California Supreme Court. Said petition once again omitted any indication that Petitioner was advancing any constitutional issue, be it federal or state. Rather, Petitioner once again chose to argue that California State law had not been properly applied to the facts of this case. Hearing was denied without opinion.

Petitioner cannot demonstrate that any of the guidelines articulated in Rule 19 of this Court have been satisfied to the slightest degree. Rather, from Petitioner's own petition, this Court can readily determine that no "special or important" reasons exist for the review of this case by this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

I

PETITIONER HAS HERETOFORE WAIVED THE  
FEDERAL QUESTIONS RAISED HEREIN.

Petitioner below has had numerous opportunities to raise the federal question herein set forth as the basis for granting the writ of certiorari. As set forth above and disclosed in Petitioner's petition at page 8, Petitioner, for reasons unknown to Respondents, did not raise the federal question in the trial court proceedings or at the time of his initial hearing before the Court of Appeal. Rule 13 of California Rules of Court provides in part that every appel-

lant's brief "shall contain a statement of the case, setting forth concisely, but as fully as necessary for a proper consideration of the case, in such order as the appellant may prefer, the nature of the action or proceeding and the relief sought..."

Petitioner's opening and reply briefs to the Court of Appeal of the State of California were silent as to the federal question. Only in his petition for rehearing did Petitioner allude to the federal question,<sup>4</sup> and rehearing was denied without any opinion.

California Rules of Court, Rule 28 (d), requires that a petition for hearing set forth all contentions in support of the petition "including all legal authorities and argument." Petitioner's petition for hearing to the California Supreme Court did not contain any authorities nor any argument concerning the federal question. If a brief filed by an appellant fails to contain a legal



argument and citation of authorities, the California courts may treat it as having been waived and pass the point without consideration. Henderson v. Security Nat. Bank (1977), 72 Cal. App. 3d 764. Therefore, under California procedure, Petitioner will be deemed to have waived the federal question, both in the Court of Appeal of the State of California and the California Supreme Court. As a result of Petitioner's failure to properly present the federal question to the state appellate courts, this Court should assume that the failure of the state court to pass upon the federal question was due to Petitioner's omission. Street v. New York (1969), 394 U.S. 576; Beck v. Washington (1961), 369 U.S. 541; Ellis v. Dixon (1955), 349 U.S. 458.

## II

### RESPONSE TO PETITIONER'S REASONS FOR GRANTING THE WRIT.

While Respondents firmly believe that the federal question has not been properly raised herein and has, in fact, been heretofore waived by Petitioner, Respondents shall respond to the questions and reasons set forth in the petition for the writ of certiorari. It is to be noted that Petitioner has merely re-argued his points and authorities presented in the Court of Appeal and Supreme Court and has not cited any additional authorities in support of the federal question herein sought to be raised.

A. THE DIRECTED VERDICT AGAINST PLAINTIFF IN A MALICIOUS PROSECUTION WAS NOT ERROR NOR A DENIAL OF THE PETITIONER'S CONSTITUTIONAL RIGHTS.

The Opinion of the Court of Appeal below adequately sets forth the rule of law in the State of California regarding whether or not the Rule 133 proceeding was of a nature which would give rise to a cause of action for malicious prosecution. <sup>5</sup>

The policy of the State of Calif-

ornia in dealing with matters such as those herein contained has been enunciated in the case of Martin v. Kearney (1975), 51 Cal.App. 3d 309 at 312:

"But in this case parents of school children were seeking redress against their children's teacher through appropriate school channels. One of the crosses a public school teacher must bear is intemperate complaint addressed to school administrators by overly-solicitous parents concerned about the teacher's conduct in the classroom. Since the law compels parents to send their children to school, appropriate channels for airing of supposed grievances against the operation of the school system must remain open."

The Court of Appeal in Imig v. Ferrar (1977), 70 Cal.App. 3d 48 at 55-

56, stated the reason for the policy as follows:

"The importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual. Thus the absolute privilege is essential."

B. THE DIRECTED VERDICT AGAINST PETITIONER AS TO THE LIBEL COUNT WAS NOT ERROR NOR A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS.

The opinion of the Court of Appeal below sets forth the rule of law in the State of California with respect to this point, and Respondents hereby adopt same. <sup>6</sup>

Petitioner's main contention herein appears to be that the Rule 133 hearing is not of the nature to give rise to malicious prosecution, and therefore the absolute privilege contained in Calif-



ornia Civil Code, Section 47(2), should not attach to Respondents' actions. In addition to the authorities cited in the opinion of the Court of Appeal, this contention was answered in Imig v. Ferrar, supra, at 58:

"Plaintiff's argument has surface appeal, but requires further analysis. The privilege has been extended to publications preliminary to official proceedings, which are intended by the author to initiate official action. However, to justify recovery for malicious prosecution, there must actually have been 'the initiation of civil proceedings against another before an administrative board which has power to take action adversely affecting the legally protected interests of the other'...If the publication does not lead the official agency to initiate such pro-

ceedings, the Plaintiff has not suffered the type of injury for which a malicious prosecution action lies."

C. THE DIRECTED VERDICT AGAINST PETITIONER AS TO THE INTERFERENCE WITH PROSPECTIVE ADVANTAGE COUNT WAS NOT ERROR NOR A DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS.

The opinion of the Court of Appeal sets forth the rule of law in the State of California with respect to this point, and Respondents hereby adopt the same. <sup>7</sup>

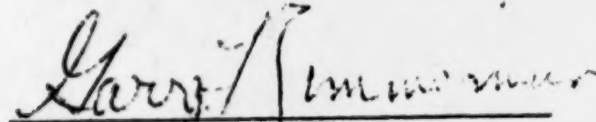
#### CONCLUSION

The court below, in a well-reasoned opinion, has answered all of the contentions of Petitioner herein. The record herein fails to disclose any denial of Petitioner's constitutional rights. Further, and more importantly for this proceeding, Petitioner has failed to timely raise the issues which, if properly raised, would be the basis of this

Court granting a writ of certiorari.

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,



GARY L. ZIMMERMAN  
FRIEMAN, ROSENFELD &  
ZIMMERMAN, A Professional  
Corporation  
Counsel for Respondents

FOOTNOTES

- <sup>1</sup> Appendix to Petition, page A-1 to A-5.
- <sup>2</sup> U.S. Sup. Ct. Rule 19, 28 U.S.C.A.
- <sup>3</sup> In their Answer to Petitioner's First Amended Complaint, Respondents pleaded the following affirmative defense to each of Petitioner's five causes of action:  
  
"The conduct of these answering Defendants was in the exercise and pursuit of their rights afforded them as citizens of the State of California and of the United States and plaintiff herein by this action seeks to abridge the exercise and pursuit of those rights in contravention of the Constitution of the State of California and the Constitution of the United States of America."  
(Clerk's Transcript, pages 82, 84, 86, 89, 91.)
- <sup>4</sup> Petition for Rehearing filed and served by Petitioner on or about January 8, 1979, page 6.
- <sup>5</sup> Appendix to Petition, page A-14 to A-19.
- <sup>6</sup> Appendix to Petition, page A-6 to A-14.
- <sup>7</sup> Appendix to Petition, page A-19 to A-20.